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MONTANA PROSECUTOR

July/August, 1978 Volume 2, No. 6

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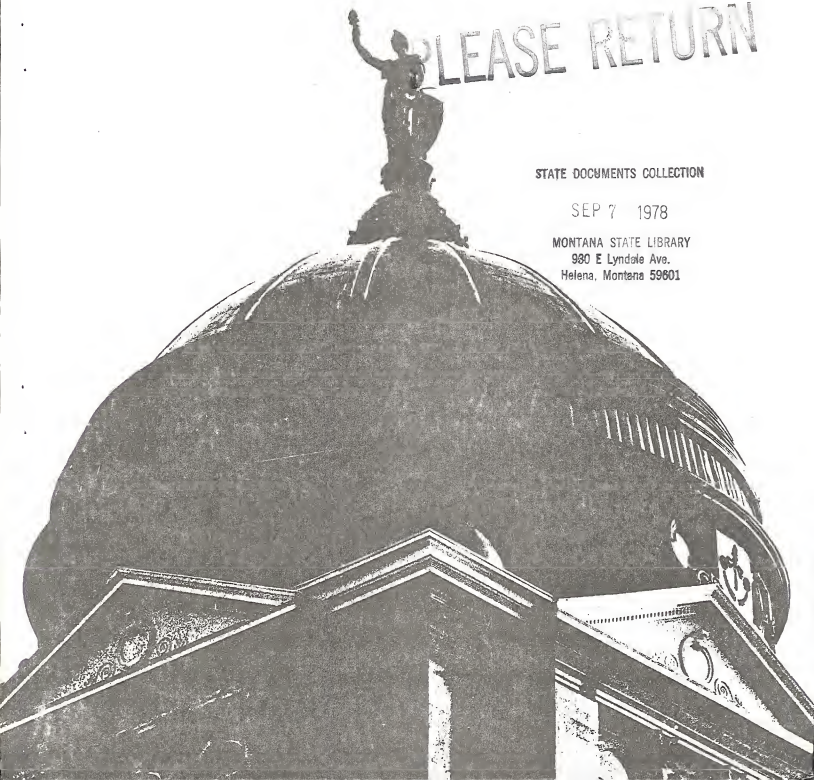

INTRODUCTORY NOTES

During the Montana County Attorney's Convention, which was held July 26-29, 1978 the following persons were elected to the offices indicated:

President:	W.G. Gilbert, III Dillon
1st Vice President:	William A. Spoja Lewistown
2nd Vice President:	Richard P. Heinz Polson
3rd Vice President:	Robert Brooks Broadus
Secretary:	Keith Haker Miles City
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Charles Graveley Helena	Harold Hanser Billings
James McCann Wolf Point	

Attendees at the convention included twenty-eight county attorneys and eleven deputy county attorneys. Among other topics, the preparation of legislation was discussed. It was decided that the traditional fall meeting in Billings should be devoted entirely to discussing legislation. That meeting has tentatively been scheduled for November 9th, 10th and 11th. Further details will be furnished as they become available.

One of the main legislative topics of discussion was the possible creation of a district attorney system. As a result of the discussions and in an effort to draft the legislation Duke Gilbert has formulated a questionaire to be answered by county attorneys. Enclosed with this issue of the Montana Prosecutor is the questionaire. Please take the time to answer it as completely as possible.

Also enclosed with this issue is a copy of the Recommendations For Improvement In Services To Abused and Neglected Children And Their Families prepared by the State Task Force on Child Abuse and Neglect. Norma Vestre, Chief of the Social Services Bureau of the Department of Social and Rehabilitation Services solicits your comments. Her address is Box 4210, Helena, Montana 59601.

The Department of Justice will once again be applying for funds to provide out-of-state prosecutor training. The grant will be presented to the Board of Crime Control for consideration at their October meeting toward the end of October. That will be the first meeting of the Board at which grants will be considered. As a result, there will be no funds available for out-of-state prosecutor training until after October, 1978.

RECENT CASES AND NOTES

PRIOR CRIMINAL ACTS

The Ninth Circuit holds that testimony about a hashish defendant's involvement in a prior cocaine deal was admissible under Rule 404(b) to show the defendant's knowledge and intent and to rebut the defendant's "mispainted picture" of innocence and ignorance. U.S. v. Batts, 23 Cr.L. 2163, April 13, 1978.

ACCOMPLICE

By giving back part of the drugs defendant gave a witness, the witness committed the crime of furnishing drugs, but did not become an accomplice to defendant's crime of furnishing the witness with drugs. Thus, an accomplice jury instruction was unnecessary. State v. Hunt, (Ariz.) 577 P.2d 717.

DISCLOSURE

Where trial judge believed destruction of tape of witness interview was because the tape was bad, defendant was given a summary of their statements, and a continuance was granted during which the witnesses were interviewed, the failure of the state to comply with a discovery order until the day of trial was not grounds to exclude the witnesses. Although the discovery order stated exclusion would be the penalty for violation, no prejudice was shown; refusing to exclude the witnesses was not an abuse of discretion. State v. Hunt, (Ariz.), 577 P.2d 717.

GUILTY PLEA - PLEA AGREEMENT

A plea agreement which stated that defendant would not be eligible for parole for five years sufficiently informed him of the special sentencing provisions. Where the extended record shows that the defendant was aware of special sentencing provisions, the judge's failure to inform him of them at the guilty plea proceeding is merely technical error. State v. Levario, (Ariz.) 577 P.2d 712.

JUDICIAL NOTICE

The Arizona Supreme Court took judicial notice that "Dilaudid" was a derivative of morphine in holding an indictment charging defendant with furnishing "Dilaudid" was sufficient to support a conviction for furnishing narcotic drugs. State v. Hunt, (Ariz.) 577 P.2d 171.

SEARCH & SEIZURE

It was reasonable for an officer approaching a car parked in the middle of the road, in an area frequented by narcotics users, to believe that possession of narcotics was taking place where one occupant made a furtive gesture toward the floorboard and white pills came flying out of the car. All evidence flowing from the subsequent arrests and warrantless search of the car was lawfully obtained. State v. Hunt, (Ariz) 577 P.2d 717.

AFFIRMATIVE DEFENSE - BURDEN OF PROOF

Jury instruction that "defendant has the burden of proving by a preponderance of the evidence" his affirmative defense (that concealed weapon wasn't accessible) is proper and constitutional. People v. Smith, (Ill.) 374 N.E.2d 472.

ALIAS

Using defendant's alias as evidence of a prior inconsistent statement to impeach his credibility was improper and was prejudicial where defendant was barred from explaining why he used an alias. People v. Berlin, (Ill.App.) 374 N.E.2d 948.

CHILD ABUSE

The felony of child abuse can properly support a conviction for felony murder, and did so here. People v. Shackley, (App.) 145 Cal.Rptr. 200.

COMPUTERS

Information from DEA computers about the identity of informants and the status of investigations was a thing of value within the meaning of a statute prohibiting the embezzlement/theft of anything of value from the government. Defendant's motions to dismiss, on the grounds that the statute applied only to tangible items, was unconstitutionally vague, and violated the First Amendment, were denied. United States v. Lambert, (D.Conn.) 446 F.Supp. 890.

COUNSEL

Attorney appointed to represent defendant had previously served as head of criminal division of State Attorney's office while case was being prepared, and thus was not appropriate counsel in absence of full disclosure to defendant. People v. Hall, (Ill.App.) 374 N.E.2d 822.

SEVERANCE

Codefendants' unsavory reputations are not per se grounds for a severance. United States v. Knowles, (10th Cir.) 572 F.2d 267.

CUSTODY

Where defendant, at the request of the police and accompanied by his father, went to police station for questioning, did not feel that he was under arrest, and, in fact, was able to leave the station house, questioning was not custodial interrogation requiring Miranda warnings, even though police suspicion had centered on defendant. State v. Johnson, (R.I.) 383 A.2d 1012.

DWI

Citing other state supreme court opinions, the Alaska Supreme Court holds that it is unnecessary to advise a defendant arrested of DWI of his right to refuse to take a breathalyzer test. Wirz v. State, (Alaska) 577 P.2d 227.

DOUBLE JEOPARDY

Where victim had not yet died at time of aggravated assault conviction, subsequent murder conviction was not precluded by Double Jeopardy clause. Lowe v. State, (Ga.) 242 S.E.2d 582.

EVIDENCE

Appellant correctly asserted that evidence introduced by prosecutor prejudiced the defense. "All of the prosecution's evidence is intended to prejudice the defense. Simply because it is damaging to the defense is no reason to exclude the evidence." Commonwealth v. Green, (Pa.) 383 A.2d 877 at 880.

FORCE

Hitting and kicking the victim of the attempted robbery in the head constituted the use of force likely to cause great bodily injury, since the victim could have been killed, paralyzed, or blinded. People v. Hopkins, (Cal.App.) 142 Cal.Rptr. 572.

FOURTH AMENDMENT - VICTIMS

Court order requiring the victim of a shooting to submit to supposedly safe surgery to remove the bullet so that it could be compared to a gun defendant turned over to the police two days after the shooting is reversed. The Fourth Amendment protects the victim, and Brady does not compel production of evidence that the state does not have. State v. Haynie, (Ga.) 242 S.E.2d 713.

HEARSAY

Co-conspirator's statement made during the course of and in the furtherance of the conspiracy is not hearsay under Federal Rules of Evidence, Rule 801. United States v. Alonzo, (5th Cir.) 571 F.2d 1384.

JUROR

Proper to allow alternate juror to retire with deliberating jury, where the alternate was under instructions not to say anything unless it became necessary for him to replace a juror. Poindexter v. State, (Ind.) 374 N.E.2d 509.

OTHER BAD ACTS

A defense attorney who had seen the police file on defendant got what he was asking for when he asked if the file contained evidence of marijuana sales and the officer replied that he would have to check the file to see if marijuana was one of the particular drugs defendant was involved in. State v. Carlson, (Minn.) 264 N.W.2d 639.

PROBATION REVOCATION

Maine reaffirms its decision that the exclusionary rule does not apply to probation revocation hearings. State v. Popsy, (Me.) 384 A.2d 42.

PROSECUTORS

Fact that the deputy District Attorney, who got a homeowner to consent to a search, was called as witness at the preliminary hearing did not disqualify his office from handling the case. People v. Lopez, (App.) 145 Cal.Rptr. 294.

SEARCH & SEIZURE

A vehicle can be seized even it if does not contain narcotics, as long as there is probable cause to believe the vehicle has been used to transport narcotics. Once the vehicle has been seized pursuant to a forfeiture statute, it may be searched at any time without a warrant and without exigent circumstances, and the fact that the car was ultimately released (without drugs but with beeper), instead of forfeited did not affect the validity of the search. United States v. Johnson, (9th Cir.) 572 F.2d 227.

SEARCH WARRANT

A search warrant authorizing searches of three residences in which defendant sometimes resided and kept property was permissible. A seven month lapse between crime and warrant did not invalidate the warrant, since it sought personal mementos, to wit, photos defendant took of his arson job and newspaper reports of the fire. State v. Ernest, (Neb.) 264 N.W.2d 677.

STANDING

Defendant charged with murder had no standing to challenge search of auto where defendant was not present when search occurred, defendant alleged no proprietary interests in auto, and defendant was not charged with offense which included, as essential element, possession of seized evidence. (Evidence seized was murder weapon). State v. Adams, (Ohio) 374 N.E.2d 137.

SUBPOENA DUCES TECUM

New Mexico's anti-racketeering statute, which allows a subpoena to be issued for business records without a showing of probable cause, is constitutional. Further the trial court's finding that defendant lacked standing to contest a subpoena issued to the bank for defendant's records is upheld. In re Investigation No. 2, Etc., (N.M.) 577 P.2d 414.

OBSCENITY - JURY INSTRUCTIONS

On May 23, 1978, the United States Supreme Court, in Pinkus v. U.S., reversed the defendant's conviction for mailing obscene materials because of an error in the court's charge. Since the acts were committed in 1971, the Roth-Memoirs obscenity standards were applicable. The trial judge instructed the jury that, in determining community standards, they must include children as members of the community. The Court held that "children are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials' proscribed by 18 U.S.C. §1461.... There was no evidence that children were the intended recipients of the materials at issue here, or that petitioner had reason to know children were likely to receive the material." The conviction was reversed.

However, the Court went on to reject several other claims of trial error. It upheld an instruction which included the "sensitive and the insensitive" in the community. "The vice is in focusing upon the most susceptible or sensitive members when judging the obscenity of materials, not in including them along with all others in the community." The Court also found sufficient evidence to permit instructions on the possible appeal to the prurient interest of deviant sexual groups and on pandering.

INADVERTENT DESTRUCTION OF EVIDENCE

On May 2, 1978, the New York Court of Appeals, in People v. Reed, held that inadvertent pretrial destruction by police of the substance which formed the basis of defendant's conviction for criminal possession of a dangerous drug did not preclude the prosecution from proffering testimony as to the nature and amount of that substance. The destruction was due to a clerical error which led the police custodian reasonably to believe that the case had been dismissed. There was no indication of bad faith. Additionally significant is the absence of any prejudice to defendant - although the drugs were available to him for independent analysis or measurement for nearly two years, he did not seek to have the drugs examined. He simply requested a copy of the police lab report. The Court concluded that, under these circumstances, "the decision to allow testimony as to the nature and amount of the material seized did not constitute error."

CALIFORNIA - SUPREME COURT REFUSES TO FOLLOW MICHIGAN v. MOSLEY

Noting that certainty is of great importance to both courts and law enforcement officials, a majority of the California Supreme Court has refused to follow Michigan v. Mosley, 423 U.S. 96 (1975), and has reaffirmed its own rule in People v. Fioritto, 68 Cal.2d 714 (1968), that once a defendant has demonstrated his unwillingness to waive his Miranda rights, police may not subject him to further interrogation, even if the Miranda warnings are again repeated to him prior to subsequent interrogation. People v. Pettingil, 23 Cr.L. 2228 (6-14-78).

WEST VIRGINIA - SPECIFIC PERFORMANCE GRANTED ON PLEA BARGAIN

In Brooks v. Narick, 23 Cr.L. 2192 (5-31-78), a defendant was entitled to specific performance on his plea bargain agreement when the state promised probation in return for a favorable diagnostic report.

PENNSYLVANIA - PRESS BARRED FROM PRETRIAL HEARING

In a First and Sixth Amendment conflict, the Pennsylvania Supreme Court upheld the exclusion of the press from pretrial suppression hearings in three murder cases which had received extensive publicity, in order to prevent a substantial threat to the rights of the defendants and the public interest. Philadelphia Newspapers, Inc. v. Jerome, 23 Cr. L. 2181 (5-31-78).

U.S. SUPREME CT. - PRESUMPTION OF INNOCENCE INSTRUCTION NECESSARY

In Taylor v. Kentucky, 23 Cr. L. 3049 (5-31-78), a 7-2 United States Supreme Court majority reversed the conviction of a defendant because the state trial judge's refusal to give a requested jury instruction on the presumption of innocence violated his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

MASSACHUSETTS - NO PRIVACY RIGHT TO SMOKE POT IN OWN HOME

The Massachusetts Supreme Judicial Court has applied the rational relation test to reject an argument that a right to privacy to have or use marijuana in private homes exists. Stanley v. Georgia, 394 U.S. 557 (1960), which dealt with the private possession of obscene material in the home, was distinguished in this case. Marcoux v. Attorney General, 23, Cr. L. 2194 (5-31-78).

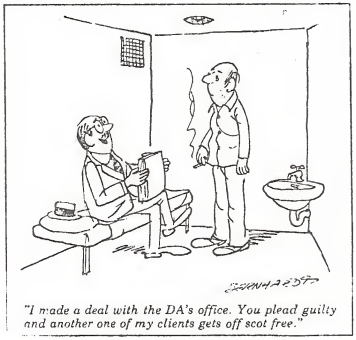
SIXTH CIRCUIT - WITNESS' STATEMENT WITHOUT DIRECT REFERENCE TO ACCUSED SUBJECT TO BRADY GUIDELINES

In Jones v. Jago, 23 Cr. L. 2191 (5-31-78), the Sixth Circuit has concluded that a witness' statement, although not specifically mentioning the defendant, is still subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963).

SEARCH OF JAILED DEFENDANT'S PROPERTY LOCKER WAS REASONABLE

Invoking what has been called the "second glance" doctrine, see U.S. v. Maslanka, 501 F.2d 208 (CA 5 1974), the Alaska Supreme Court upholds a police-requested warrantless search of a jailed defendant's property locker by jail personnel three months after he was arrested and the property placed in storage. The police had already seen the piece of evidence in which they were interested - an unusual hat - at the time of the defendant's arrest. The search they requested - the "second glance" - merely verified the continued availability of something that had been in plain view at the time of the arrest. Under these circumstances, no invasion of privacy occurred.

In any event, the jail agreed to release the hat to the police only after a warrant had been issued. There was sufficient probable cause for the warrant, the court holds, even without the jail's confirmation that the hat was still with the defendant's property. The defendant was wearing the hat at the time of the attempted robbery and when he was arrested, and he had been in continuous custody ever since. Agreeing that these factors established probable cause for the warrant, Justice Rabinowitz, concurring, sees no reason to reach the "second glance" rationale. Griffith v. State, 5-5-78.



"I made a deal with the DA's office. You plead guilty and another one of my clients gets off scot free."

DRUG DEALERS CAN BE DENIED BOND PENDING APPEAL

The New York Supreme Court, Appellate Division, upheld this state provision as not offensive to consitutional equal protection and as not constituting cruel or unusual punishment. They held that it is up to the legislature to decide which offenses are bailable following conviction. Post conviction bonding need not depend on the risk that a particular offender will abscond. Gold v. Shapiro, NY Sup.Ct., App.Div, 2d Dpt; (4/3/78), 23 Cr.L. 2111, 5/3/78.